United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-1578

75-7600

To Be Argued by
AMALYA L. KEARSE

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES BROADCAST MUSIC, INC., *ET AL.*

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Preliminary Statement

This brief is submitted by defendants-appellees Broadcast Music, Inc. ("BMI") *et al.* in opposition to an appeal by plaintiff-appellant Columbia Broadcasting System, Inc. ("CBS") from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, dismissing the complaint after trial of the liability issues. Judge Lasker's opinion is reported

at 400 F. Supp. 737 (S.D.N.Y. 1975) and is reprinted in the joint appendix at 2 JA 584-630.

Issues Presented

1. Was the district court correct in holding that the acquisition by BMI of public performance rights from the owners of copyrights on musical compositions and the granting by BMI of blanket performance licenses to CBS and other television networks does not constitute price fixing in violation of Section 1 of the Sherman Act?

2. Was the district court correct in dismissing CBS' monopolization claim on the grounds that the relevant market is the market for public performance rights for music wanted for television network use and that BMI does not possess monopoly power in the relevant market?

Statement of the Case

The Parties

Plaintiff-appellant CBS operates one of the three national television networks. CBS supplies some 7500 programs annually to approximately 200 affiliated television stations and five wholly-owned television stations throughout the country (400 F. Supp. at 742, 2 JA 589). In addition to its television network and its five television stations, CBS owns and operates fourteen radio stations, one of the four national radio networks, the world's largest record company, several music publishing companies, and a number of other businesses (20 JA 1, 7; 16 JA 4615-16).

The principal defendants-appellees are American Society of Composers, Authors and Publishers ("ASCAP") and BMI. ASCAP, which was founded in 1914, is a membership organization of writers and publishers of music. BMI, founded in 1939, is a non-profit corporation owned and operated entirely by broadcasters (400 F. Supp. at 742, 2 JA 589). BMI and ASCAP acquire from individual copyright owners the right to license

public performances for profit of copyrighted musical compositions.*

Copyright owners who offer their works for license through ASCAP or BMI also retain the right to license music users directly.** However, performances are so fleeting and music users so widely scattered that an individual copyright owner would have great difficulty in learning of and licensing each use by all of the radio stations, taverns, night clubs, concert halls and other users around the country (see 400 F. Supp. at 741, 2 JA 588). Further, most users of music would find it time-consuming and expensive to seek out the individual copyright owners of each composition they wished to use in order to obtain the necessary licenses (*Id.*). These circumstances have led to the development of central music licensing agencies in every country having professional composers (13 JA 3599; 20 JA 44).

CBS Television Network Music Usage

This case concerns the licensing of the rights to perform copyrighted music on CBS' television network. CBS' television network uses music from two kinds of sources. Most music — particularly theme and background music — is composed especially for the CBS program. Other music — particularly feature songs sung on-camera — is previously published music. Rights to specially composed music ordinarily are controlled either by the program producer from which CBS obtains the program or by the writer hired to compose the music. Rights to previously published music ordinarily are controlled by a

*The complaint also names as defendants several writers and publishers who are members of ASCAP and several writers and publishers who have licensed their works through BMI (BMI "affiliates"). These groups have been respectively declared representatives of the classes of ASCAP members and BMI affiliates.

**Members of ASCAP grant ASCAP only a non-exclusive right to license their works, and remain free to grant performance licenses to any user (see ASCAP Consent Decree, 20 JA 124). BMI affiliates equally remain free to grant performance licenses directly to users. While the BMI Consent Decree (24 JA 1568) differs from the ASCAP decree in form, CBS stipulated that in substance BMI writers and publishers are as free as ASCAP members to grant public performance licenses directly (21 JA 386) (see 400 F. Supp. at 744-45, 2 JA 591-92).

publisher having no connection with the program (400 F. Supp. at 755-57, 2 JA 602-04).

Music use patterns on CBS television network programs vary sharply depending upon the type of program. Typically, CBS' news and public affairs programs use no music at all. The situation comedy, crime and drama series, which make up so much of the network programming, ordinarily use only specially composed music. And although previously published music is performed occasionally on almost every kind of show, it is used regularly only on the relatively few shows having a musical variety format -- the Carol Burnett show, talk shows, football half-time shows, and the Captain Kangaroo show (400 F. Supp. at 756,778, 2 JA 603, 625; 12 JA 3250-51; Plaintiff's Exhibits 540-41).

The Kinds of Music Licenses Available

There are several kinds of music performance licenses available. Most users of music in the BMI or ASCAP repertories have elected to meet their licensing needs with "blanket" licenses from BMI and ASCAP. With a blanket license, the user may, without advance notice, perform any of the songs in the repertory any number of times during the license period in return for a fee expressed either as a flat dollar amount or as a percentage of receipts. Instead of blanket licenses, some broadcasters have elected to take "per program" licenses which ASCAP and BMI are required to offer by consent decrees.* Under a per program license, a broadcaster receives the same protection offered by a blanket license, but need pay a fee only in respect of programs in which a licensed composition is performed (400 F. Supp. at 778-79, 2 JA 625-26).**

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*Both ASCAP and BMI have entered into government consent decrees. ASCAP's original consent decree was entered into in 1941 and was amended in 1950 and 1960. BMI's consent decree was entered into in 1941 and was replaced in 1966. The decrees and their relationship to this case are described in Judge Lasker's opinion (400 F. Supp. at 743-45, 2 JA 590-92).

**BMI's consent decree provides for a "per programming period" license as well. This license is identical to a per program license except that the units of measurement are fifteen minute segments rather than programs (24 JA 1568,1574).

The History of this Lawsuit and of CBS' Demands

To understand CBS' posture on this appeal, it is helpful to know the circumstances under which this case was brought and the course the litigation has taken. From the inception of commercial television more than twenty-five years ago until 1969, CBS and the other television networks had always held blanket licenses from BMI and ASCAP (400 F. Supp. at 742, 2 JA 589). Indeed, when a group of broadcasters led by CBS formed BMI in 1939,* they caused BMI to offer blanket licenses (see 400 F. Supp. at 753, 2 JA 600; 15 JA 4251-52).

In October 1969, following a series of unproductive negotiations on a new fee for BMI's blanket license to CBS, BMI gave notice that the blanket license would be terminated on December 31, 1969 (24 JA 1579). In late December 1969, CBS wrote BMI and ASCAP asserting that blanket licenses were "unfair" and that BMI and ASCAP were obligated to offer "per use" licenses to CBS under the rationale of a then recently decided case involving tying arrangements, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (see 1 JA 31). A few hours before its license from BMI was due to expire, CBS commenced this action.

Prior to its December 1969 letter CBS had never suggested any dissatisfaction with the blanket form of license (400 F. Supp. at 753-54, 2 JA 600-01). As Judge Lasker pointed out, "this suit did not follow a breakdown in negotiations for a new form of license, but for a renewal of CBS' *blanket* license from BMI" (400 F. Supp. at 753, 2 JA 600; emphasis in original). And it was BMI, not CBS, which had terminated the license (*Id.*).

The complaint charged that CBS had always "received" blanket licenses from BMI and ASCAP for its television network and that CBS had therefore been compelled to pay performance royalties with respect to programs which used no music, and to pay the same royalties for a program using only a single composition as for a program using many compositions (1 JA 25 para. 14, 1 JA 27-28 para. 19, 1 JA 31). In addition to this tying

*CBS disposed of its stock interest in BMI in 1959 (400 F. Supp. at 742, 2 JA 589).

claim, the complaint charged ASCAP and BMI with monopolization.

It soon became apparent that CBS' claims were analytically unsound. On the tying claim, CBS was unable to identify separate tying and tied products. Moreover, CBS had failed to take account of the fact that performance rights offered for license through ASCAP and BMI also were available singly from the copyright owners. Thus, the market power necessary to establish a tying or a monopolization claim simply did not exist.

Usually, discovery of such fundamental flaws causes a case to fade quietly away. In this case, it provoked CBS to undertake a discovery program of epic proportions in search of a colorable theory. The search led to a number of major shifts in CBS' legal theories and demands for relief. After dozens of depositions, thousands of exhibits, and millions of dollars of expense to the parties, CBS shifted its principal legal theory from tying to what might best be described as threatened group boycott.

Through these stages of the litigation CBS' principal demand was that BMI and ASCAP be ordered to grant licenses on what CBS called a "per use" basis. The central feature of the per use system was that royalty rates would be fixed for each type of use of a composition in the BMI or ASCAP repertory (see 400 F. Supp. at 747 n.7, 2 JA 594 n.7). As the trial date neared, CBS added an alternative demand that BMI and ASCAP be enjoined from offering blanket licenses to any television network.*

After several years of discovery, Judge Lasker ordered that the trial be limited to specified issues of liability, reserving questions of relief for later determination in the event that CBS prevailed on liability. The issues tried in the liability phase were as follows:

> "(i) Whether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint;

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*CBS officers testified on deposition that if CBS chose to do without a blanket license while NBC and ABC elected to keep blanket licenses, CBS' programming would suffer creatively (Paley, 19 JA 764-65; Stanton, 19 JA 876-77), and would have a "second-class appearance" and be "bush league compared to NBC and ABC" (Wood, 19 JA 1016-17). Hence CBS did not want NBC and ABC to be allowed to have blanket licenses (3 JA 84-86).

(ii) Whether, if such restraint or compulsion exists, it is reasonable and justified or whether it may be achieved by less anti-competitive means." (400 F. Supp. at 747, 2 JA 594).

The trial of the liability issues consumed 29 court days, covered 4,873 pages of testimony by 30 witnesses, and saw the introduction into evidence of parts of 24 depositions and more than 500 other exhibits. After evaluating all of the evidence, the district court dismissed CBS' complaint. The court's comprehensive and careful opinion fully reflects the year of study the court devoted to the matter after post-trial briefs were submitted. Finding against CBS on the issue of actionable restraint of trade, the court was not required to reach the second issue of whether CBS' proposed relief would be more competitive.*

The district court held that CBS had failed to meet its burden of proving that the defendants illegally restrained trade in the market for performance rights for music for network television use or that they compelled CBS to take a blanket license as alleged in the complaint (*e.g.*, 400 F. Supp. at 782-83, 2 JA 629-30). Pointing out that the writer and publisher defendants were not charged with having agreed among themselves as to the prices to be charged for the compositions offered by each of them, Judge Lasker ruled that the offering of licenses by individuals through a common sales agent at a negotiated package price is not *per se* unlawful (400 F. Supp. at 747-49, 2 JA 594-96) and was not proven to be unlawful in the circumstances revealed by the trial evidence (400 F. Supp. at 780, 2 JA 627).

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*CBS overlooks the existence of this issue when it suggests that if CBS were to be successful on this appeal the case should be remanded for the awarding of relief. The district court properly judged that even if some restraint of trade were proven, CBS would not have proven a violation if CBS' proposals themselves were anticompetitive. CBS proposed to have the court either (1) order a "per use system" in which CBS would be given a schedule of fixed rates by BMI and ASCAP for various individual uses of music, against which CBS could bargain directly with individual copyright owners for lower rates, or (2) enjoin BMI and ASCAP from offering blanket licenses to any television network. In the district court both proposals were shown to be seriously anticompetitive, the first because it seeks to place a ceiling on market prices chargeable by copyright owners, and the second because it seeks to eliminate a source of supply found desirable by the other television networks and thereby to limit the competition between CBS and the other networks.

The court observed that it would be a simple matter for CBS to obtain direct licenses from individual copyright owners for most of its theme and background music — the only kinds of music used on most programs — since this music is created especially for the program by someone hired for that purpose (400 F. Supp. at 755-58, 2 JA 602-05). Further, the court concluded that CBS had failed to prove that there are substantial mechanical obstacles to direct licensing of previously published music (400 F. Supp. at 757-65, 2 JA 604-12), and found that the testimony of live witnesses and deponents alike compelled the conclusion that individual copyright owners would virtually line up at CBS' door to grant licenses directly to CBS if CBS elected to acquire its music in that way (400 F. Supp. at 766-71, 779, 2 JA 613-18, 626).

Thus, the court found that neither the history of the relationship between the parties nor the events leading to this suit nor the inclinations of the individual copyright owners suggested that CBS had been compelled to take blanket licenses (400 F. Supp. at 754, 2 JA 601). It followed that BMI and ASCAP could not be deemed illegal combinations merely because they offered blanket licenses and that their activities did not constitute unlawful tying arrangements or group boycotts.

Finally, the court found that ASCAP and BMI had not monopolized any relevant market. The appropriate market was performance rights to music wanted for network television use. In light of the interchangeability of compositions and the number of sources from which performance licenses were available, neither organization could be said to have monopolized the market.

Following trial CBS once again has shifted ground. Jettisoning its once featured tie-in and boycott claims, CBS has now made price fixing its principal claim. And its demand for a per use license — the original basis of its suit — has been downgraded to "alternative" relief (CBS Brief p. 12 n.). The primary relief sought is now said to be an injunction against "price fixing" (CBS Brief p. 4). Since CBS claims that BMI and ASCAP fix prices merely by offering blanket licenses (CBS Brief pp. 65-66), the so-called injunction against price fixing is apparently

another way of describing the injunction against the offering of blanket licenses which CBS sought below.

In its latest attempt to change the field of battle, CBS has taken up no more tenable a position.

ARGUMENT

The order dismissing CBS' complaint should be affirmed because CBS failed to prove a restraint of trade in violation of Section 1 of the Sherman Act or monopolization in violation of Section 2. CBS failed to establish any factual foundation for a finding of price fixing. There was no evidence of any agreement on price or any exchange of price information. Rather there was substantial evidence that licenses are available directly from writers and publishers, and that writers and publishers would compete fiercely with one another in the granting of direct licenses if CBS chose to acquire music rights in that way. The availability of direct licenses destroys CBS' Section 1 claim.

CBS' claim of monopolization is based on a market definition that is clearly fallacious. The trial evidence showed that the proper market is the market for public performance rights to music for network television. The record demonstrated that for each need there were a number of appropriate songs available and that rights to such songs could be obtained from several sources. Thus the district court was clearly justified in dismissing the monopolization claim.

CBS' arguments on this appeal appear to proceed from the assumption that CBS is entitled to a trial *de novo* in this Court. Seemingly oblivious to the appropriate standards of review, CBS has filled its papers with discourses on items of evidence CBS regards as favorable to its case and has observed that the district court "did not discuss", "did not note", "did not refer to", "was silent as to", "nowhere addressed", or failed "to specify or otherwise describe" various bits of evidence (*e.g.*, CBS Brief pp. 8, 9, 22, 52, 67n., 86, 90, Addendum A pp. 21-22, Addendum D p. 1).

This case was decided after an eight-week trial at which voluminous evidence was introduced. The trial court was not

required to accept CBS' assertions as true. Rather, the court's task was to hear and sift all the evidence, evaluate it as to its weight and credibility, and make findings of fact based on those evaluations. The standard by which those findings are to be reviewed is familiar:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *" F.R. Civ. P. 52(a).

All of Judge Lasker's findings were based on very substantial evidence. Much of this evidence was specifically set forth in his thorough and careful opinion. There is no basis whatever for attacking the district court's findings of fact.

POINT I.

THE OFFERING OF BLANKET LICENSES FOR PUBLIC PERFORMANCE RIGHTS TO MUSIC FOR TELEVISION NETWORKS IS NOT PRICE FIXING.

CBS asserts that the offering of blanket licenses constitutes price fixing. CBS does not, however, suggest that writers and publishers have agreed among themselves as to the prices to be charged for music licenses to particular compositions (see 400 F. Supp. at 748, 2 JA 595).* Nor does it claim that writers and publishers have agreed not to compete on a price basis (2 JA 360). Rather, CBS argues (A) that writers and publishers fix prices by agreeing among themselves to license their rights together through a licensing organization at a single price to be negotiated by the licensing organization; (B) that if direct licensing transactions were to occur, the shares of the blanket license single price that are distributed to writers and publishers would be refer-

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*In its Post-Trial Brief, 2 JA 360, CBS said that the classic form of a price fixing agreement would be for music suppliers to agree among themselves "to charge television networks $800 for each feature use." This is indistinguishable from the per use system demanded by CBS.

ence points which would improperly stabilize direct license prices; and (C) that so long as the single-price blanket license is made available, writers and publishers in direct licensing transactions would charge CBS premiums over fair market value in order to force CBS to resume a blanket license.

In support of its price fixing claim, CBS has extracted bits of language from decisions dealing with factual situations quite remote from those presented here. Cases involving exchanges of price information or price supports for distressed oil are of no assistance in resolving this case.

As Judge Medina observed in *United States* v. *Morgan*, 118 F. Supp. 621, 688 (S.D.N.Y. 1953), lawyers in antitrust cases

> "* * * often fail to heed repeated admonitions that each case must necessarily stand on its own legs, and that the conclusions reached in each depend largely upon the peculiar characteristics of the particular industry involved. * * *"

In this case, CBS' "endless * * * discussion of decisions rendered in earlier cases" and "liberal quotations from opinions intended to apply to particular situations" (*Id.*) have added greatly to the bulk of its papers without aiding in analysis of the issues presented. Analysis of those issues demonstrates that CBS' arguments are without merit.

A. BMI's Affiliation Contracts Are Not Price Fixing Agreements.

Not surprisingly the CBS discussion of price fixing ignores BMI and concentrates exclusively on ASCAP and its members, for CBS' labored attempt to force the facts of this case into a price fixing model disintegrates entirely when applied to BMI and its affiliates. The agreements between BMI and its affiliated writers and publishers simply cannot be characterized as price fixing agreements.

Owners of copyrighted songs who are affiliated with BMI convey to BMI the right to license their songs, and BMI in turn licenses the right to perform those songs to music users such as

CBS. The fee for the use of the BMI repertory is exclusively a matter for negotiation between BMI and the music user. BMI affiliates, under their contracts with BMI, do not have the right to participate in the determination of how much BMI will charge users for its repertory (see, *e.g.*, 21 JA 537, 21 JA 543, 21 JA 552). BMI is owned entirely by broadcasters (400 F. Supp. at 742, 2 JA 589). Writers and publishers have no ownership interest in BMI and have no part in its management (15 JA 4247-49).

A price fixing agreement is an agreement by which A and B agree on the price that one or both of them will charge to C. Thus, if A is a BMI affiliated writer or publisher, B is BMI, and C is CBS, there is no price fixing agreement between A and B because A plays no role whatever in determining the price at which B will license C. Thus, the relationships between BMI and its affiliates are just not price fixing agreements.

Even if writers and publishers did control the price at which BMI licensed, the arrangements would not amount to price fixing. Arrangements under which competitors get together to offer a package license allowing licensees to obtain benefits not available from individual licenses have been evaluated under the rule of reason so long as the competitors retain the right to issue individual licenses.* Thus, agreements among licensors of interlocking patents on a price for a license to all of the patents and on a formula for division of the proceeds have been upheld as reasonable. *See, e.g., Standard Oil Co. (Indiana)* v. *United States,* 283 U.S. 163 (1931); *International Manufacturing Co.* v. *Landon, Inc.*, 336 F.2d 723, 729 (9th Cir. 1964), *cert. denied sub nom. Jacuzzi Bros., Inc.* v. *Landon, Inc.*, 379 U.S. 988 (1965).

Similarly, agreements among ASCAP members to offer blanket licenses, which provide comprehensive protection against copyright infringements through inadvertent, unanticipated or spontaneous performances of copyrighted music, have been upheld as reasonable. *See K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045

*Both ASCAP members and BMI affiliates are free to grant performance licenses directly to users. See second footnote p. 3 *supra*.

(1968). Thus, even if BMI were controlled by its affiliated writers and publishers, there would be no warrant for treating its activities as *per se* unlawful.

B. The Offering of Blanket Licenses to Television Networks Would Not Unlawfully Stabilize Direct License Prices.

CBS' second claim of price fixing rests on the hypothesis that if CBS attempted direct licensing, the prices of those licenses would be stabilized by the level of distributions that individual copyright owners had received from BMI or ASCAP under blanket licenses to other television networks (CBS Brief pp. 37-38). Even if CBS were correct on the facts, it would not have proved price fixing.

A publisher negotiating with CBS over price in a direct licensing transaction might well take into account the amount of the BMI distribution he had received in respect of a performance on the NBC or ABC television networks. This, however, is entirely appropriate. In negotiating with a customer, any seller will consider what he has obtained in past sales to other customers, directly or through middlemen. There in nothing unlawful about this common and sensible practice.

Moreover, much of CBS' discussion presumes that copyright owners have a choice of whether to license directly or through a licensing organization. In fact, copyright owners have no such choice. Songs may be licensed directly only if a music user elects to acquire its rights in that way. In the 1930's, when Warner Brothers withdrew its catalog from ASCAP and attempted to license directly, the results were disastrous. Music users confined themselves to songs available through ASCAP and refused to take licenses to the Warner Brothers catalog (19 JA 645-55). Thus, a writer or publisher does not, as a practical matter, have the option to license through a licensing organization or to license directly. He must license in the manner the user asks; otherwise his music will not be used.

C. Writers and Publishers Would Not Attempt To "Hold Up" CBS.

CBS' final argument in support of its price fixing claim is that so long as blanket licenses continue to be offered by the music licensing organizations, writers and publishers would demand premiums over fair market values in direct license negotiations with CBS in order to force CBS back to blanket licenses. CBS charges the district court with its "principal error" in failing to consider CBS' evidence in relation to this contention (CBS Addendum A p. 19, Brief p. 56). Thus, CBS asserts that the court considered "attitudinal" evidence only in regard to the issue of threatened boycott and not in regard to the issue of threatened price premiums.

A fair reading of the court's opinion demonstrates that the court did consider CBS' argument that copyright owners would attempt to overcharge CBS and found that the argument was without evidentiary support. Before analyzing CBS' attitudinal proof, Judge Lasker summarized CBS' contentions as follows:

> "In the absence of proof that direct licensing is unfeasible because of mechanical obstacles CBS' case rests primarily on its claim that copyright proprietors would refuse to deal directly if CBS asked, *or at least make it such an* arduous and *expensive proposition that CBS would be forced to resume the blanket arrangement.*" (400 F. Supp. at 765, 2 JA 612; emphasis added.)

The court then reviewed the evidence in detail and found CBS' charges to be without merit. The district court's discussion does place more emphasis on refusal to deal than on price premiums, thereby reflecting the relative weights CBS gave to these claims at trial. But to assert that the district court failed to consider what CBS calls the price premium issue is to ignore the plain language of the opinion.

In evaluating the evidence on this issue, it is important to examine the nature of CBS' charge: CBS does not allege that any writer or publisher has attempted in the past to exact price

premiums from CBS;* rather, CBS makes the outrageous charge that writers or publishers would do so in the future if given the opportunity. This bizarre claim that 52,000 class members have states of mind which would lead them to engage in criminal activity in certain hypothetical circumstances proved utterly unfounded at trial.

1. The Deposition Testimony

In this Court, as below, CBS attempts to support its claim that copyright owners would not deal directly or would "hold up" CBS for premiums by excerpting selective quotations from the depositions of four publishers — Leon Brettler, Edwin H. Morris, Jerry Vogel, and Eugene Goodman. These excerpts, strung together, comprise the major portion of Addendum A to CBS' brief.

Regrettably, we must note at the outset that CBS' excerpts cannot be relied upon as fairly reflecting the substance of the testimony. As one example, we cite the following: CBS states that the district court failed to note that publisher Edwin H. Morris had testified that he would not approach the network in the event CBS elected to bypass ASCAP in order to license directly and "would *not* even do so if there had been

> 'a period of several months in which other publishers are visiting television producers. Their music is being used on CBS and your music is not being used.' (D707)" (CBS Addendum A pp. 22-23; emphasis in original.)

CBS does make the equally unfounded claim that Minnesota Mining and Manufacturing Company ("3M") " * * certainly paid substantial premiums over fair market values * * *" for direct licenses from ASCAP members for use in connection with its M-700 background music units designed for sale to retail establishments (CBS Brief p. 55).

The record demonstrates, however, that 3M got a bargain. 3M's opening offer for a license from ASCAP was $27 per tape per year. When 3M decided to obtain licenses directly rather than through ASCAP, it was able to obtain direct licenses for a total cost of $21 per tape per year — twenty-five per cent less than its opening offer to ASCAP (400 F. Supp. at 772 n. 17, 2 JA 619 n. 17). To charge that this experience demonstrates that publishers would exact "premiums" for licensing outside of ASCAP is ludicrous.

In the first place, the quoted language was not offered into evidence at trial. More importantly, even if offered, the quoted language would have been excluded since it was not Morris' statement, but was rather the statement of CBS' counsel which Morris unequivocally refused to adopt:

> "Q Let's try to make the facts more concrete and perfectly realistic.
>
> The announcement is made at time one. There then follows a period of several months in which other publishers are visiting television producers. Their music is being used on CBS and your music is not being used.
>
> Under those circumstances, would you solicit?
>
> "A *You are asking for a wonderful answer and you are not going to get it.* I don't know what my attorneys would say at that time. What another publisher does —
>
> "Q This would cause a legal problem in your mind?
>
> "A When I am talking to a man of your stature and representing whom you do, calls for that though because I say, I am a layman. I don't know. There are many, many aspects which as you know I have been through it for years. My testimony has shown you the types of things I am involved with. I am cautious. *I don't know. I am not prepared to say yes or no because I don't know. I am not being evasive. I just don't know.*" (19 JA 707-08; emphasis added.)

Moreover, as Judge Lasker observed, "far from stating that he would not deal with CBS, [Morris] testified:

> 'Q Let us assume that telephone does ring, that you are approached by producers and/or network people who are interested in obtaining direct licenses to the compositions or various of the compositions in the Morris catalog. Do you talk to these people?
>
> A Yes.
>
> Q Do you invite them to come into your office?
>
> A I will even go to theirs.' (Dep. 211-12)" (400 F. Supp. at 768, 2 JA 615)

Although CBS bristles at the description of its excerpts as "snippets" (see 400 F. Supp. at 767, 2 JA 614; CBS Brief p. 57 n.), it is precisely because of CBS' distortions of the record that the district court found that when the excerpts were read in context they took on "an entirely different hue" (400 F. Supp. at 768, 2 JA 615). The court found that taken in context the deposition testimony as a whole established that direct licenses are available from individual copyright owners:

> "Indeed, the snippets of testimony on which CBS relies are replete with the Darwinian imagery of cutthroat competition among hungry publishers and writers seeking network exposure. The colorful deposition testimony of Leon Brettler, an officer of Shapiro, Bernstein, Inc., is an example:
>
> > 'Q Do you think that there would be a good deal of price cutting by publishers in the licensing of performance rights to television networks?
> >
> > '. . .
> >
> > A In this case I haven't got the slightest hesitation of saying not that I know, but I am virtually positive there would be a deluge of price cutting bordering on the cutthroat nature that would lead to mutual self-annihilation.
> >
> > '. . .
> >
> > 'I mean among us competitors who would be so desperate and jockeying for position, none of us having any strength, dealing with one huge user or an industry that is a huge user, consisting of three main entities and we only have those three doors open to us and all 4000 of us converging through that door, I think there would be tremendous amounts of concessions and price cutting and deals.' (Dep. 295-98)
>
> * * * * * *
>
> 'I think that it would have substantial impact across the board, even to the big companies . . . the largest

> music publisher is still David compared to the Goliath of the television industry. The so-called top ten are still Davids compared to Goliath and the only time that I have ever heard of David whipping Goliath was in the Bible. Usually Goliath swamps David.' (Dep. 302-03)
>
> We do not view this testimony as aiding CBS' case. It tends rather to establish that copyright owners would line up at CBS' door if direct dealing were the only avenue to fame and fortune." (400 F. Supp. at 767-68, 2 JA 614-15; all indications of deletions appear as in opinion.)

2. The Testimony at Trial

CBS' portrayal of the trial testimony is likewise often inaccurate. For example, in its argument that copyright owners would charge premiums to license music that was already "in the can",* CBS quotes testimony by Albert Berman, an intermediary in the licensing of synchronization rights,** as to an instance in which one French publisher charged a premium for such rights. CBS states that Berman cited this instance as "one example among many based on actual experience" (CBS Brief p. 97). The transcript reveals that the instance described by Berman, far from being "one example among many", was an example of "a few eccentric publishers":

> "THE COURT: *I suppose you have a few eccentric publishers who feel that their songs are worth more and ask it?*
>
> THE WITNESS: That's basically it. There are some songs that are almost pinpointed as danger songs. We try to alert users that if they want it it will cost them a lot of money.
>
> Q 'Happy Birthday"?
>
> A Among others.

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*Television programs or movies which have been filmed or taped are said to be "in the can" and the music recorded on the soundtrack of such films or tapes is called "music in the can" (400 F. Supp. at 775, 2 JA 622).

**A synchronization right is the right to record music in synchronization with film or video tape and is one of the bundle of rights given to copyright owners (11 JA 2975-76).

MR. TOPKIS: Could we have some other examples than 'Happy Birthday,' just to liven it up?

Q Could you give us some other examples?

A [Whereupon, the witness described the incident involving the French publisher]." (5 JA 928-29; emphasis added.)

In the remainder of his testimony, Berman made it abundantly clear that the French publisher was the exception rather than the rule. Berman noted that publishers often sought synchronization licenses after the program had been filmed (5 JA 979-80) and that ordinarily

"* * * the publisher has always charged the normal rate he would have charged in the first place." (5 JA 967)

And

"Generally publishers quote the same fee. They rarely quote on a punitive basis." (5 JA 977)

Under questioning by CBS' counsel, Berman testified that producers feel perfectly safe in not seeking licenses until after a program has been put "in the can" because

"* * * there is a certain confidence on the part of producers that they will not be held up by publishers when they want to use a song after the fact.

Q Do you have any opinion as to what the basis is for that confidence?

A The basis is that the users and providers of music have to live together. Nobody wants to lock himself up in a closet and not have them used. The producers are aware of that. It is a common interest that would prompt this type of action." (5 JA 981A-82)

The trial testimony showed overwhelmingly that writers and publishers would vie with one another to grant licenses directly to CBS, despite CBS' production of five witnesses who disputed this

conclusion.* Four of these witnesses — CBS' vice president for business affairs, two assistant producers for CBS programs, and CBS' expert economist — had never spoken to a writer or publisher on the subject (400 F. Supp. at 765-66, 2 JA 612-13). The court found that "* * * [t]heir testimony on the point was unimpressive * * *" (400 F. Supp. at 765, 2 JA 612). CBS' fifth witness was Walter Dean, executive vice president of two large music publishing companies, who testified that his companies would refuse to license CBS directly. Dean's companies, however, are owned by CBS, and the copyrights he claimed he would refuse to license to CBS are also owned by CBS — facts not lost on the court (see 400 F. Supp. at 770, 2 JA 617).

There was a great deal of testimony at trial from witnesses the district court found credible that supported the conclusion that direct licenses are available to CBS. For example, the court quoted the testimony of publisher Arnold Broido that

> " 'the publishers would by and large talk with CBS or anyone else who came to them.' (Tr. 3498)" (400 F. Supp. at 768, 2 JA 615)

and of Salvatore Chiantia, President of the Music Division of MCA, Inc., who testified:

> " 'My primary responsibility is to get my music played. To get it exposed. And if I have to go to CBS in a direct licensing scheme, I am going to go. I am not going to sit back and say, I hope you fail. I want you to use my music and I am going to try to make it work.' (Tr. 2957)
>
> 'There are only three games in town. I have to play one of three games. If we are talking about television, there are only three games in town. If I am effectively cut out from one, I only have two more to play with.' (Tr. 2947)" (400 F. Supp. at 768, 2 JA 615)

The testimony of the composers was similar. The court quoted at some length from the testimony of composer John

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*CBS' witnesses were forced to concede, however, that composers hired especially to compose music for a CBS program would be willing to license CBS directly (400 F. Supp. at 766, 2 JA 613; 4 JA 489, 5 JA 726).

Green as to his willingness to deal directly and the incentives to do so, including the following:

> " 'Q Mr. Green, suppose the following hypothesis. That CBS canceled its ASCAP blanket license and NBC and ABC continued to hold blanket licenses from ASCAP and suppose that either CBS or a producer of a CBS film series show came to you and sought to engage you to write the background and theme music for the show.
>
> Would you be inclined or disinclined to negotiate with him for the writing of that music?
>
> A I would be inclined to negotiate with him.
>
> * * *
>
> Q Mr. Green, can you tell us why you would be inclined to negotiate with CBS or the producer of the CBS show in that situation?
>
> A For the following reasons. I like to think that part of my motivation is aesthetic and artistic, but I am also a fellow who earns his living by the making of music in various forms. I am also an artist who derives only secondary pleasure from thinking how great my music is when I hear it in my head.
>
> I like to hear it performed and I like to get paid for hearing it performed and you referred to [CBS]—would I be inclined to negotiate with [CBS] for the performance? Well, they are one of the principal outlets in the world for the performance of music and I want my music to be performed, I want the public to hear it, I want to get paid for it and I would be totally inclined to negotiate with anybody who would like to use it. * * *' (Tr. 3457-60)" (400 F. Supp. at 769-70, 2 JA 616-17)

3. The Business Incentives

The court found that the extensive evidence on the nature of the music used on television network programs and the nature of the music industry "amply" confirmed the conclusion suggested by the live and deposition testimony: that CBS would be able to secure direct licenses at competitive price levels if it asked for them (400 F. Supp. at 770, 2 JA 617). The court found that

> "* * * Copyright proprietors are eager to have their music performed on television not simply to earn performance royalties distributed through ASCAP and BMI, but because a television performance before millions of viewers is the most effective way to sell phonograph records and sheet music, and to generate performances by other music users. No less than eleven witnesses testified to the compelling desire of writers and publishers to gain television exposure for their music. * * *" (*Id.*)

Further, the court accepted the testimony of the CBS witnesses that for any given music need on a television network program, there are ordinarily a number of songs which would be suitable (400 F. Supp. at 771, 779, 782-83, 2 JA 618, 626, 629-30), and pointed out that since there are only three national television networks and only a few programs on the networks that use previously published music, the opportunity for gaining the desired exposure is quite limited (400 F. Supp. at 770, 2 JA 617).

Judge Lasker also relied on the evidence that CBS is the largest manufacturer and seller of records and tapes in the world; that CBS owns radio and television stations in a number of major metropolitan areas, and that CBS is "The No. 1 outlet in the history of entertainment" and "the giant of the world in the use of music rights (Tr. 3374)" (400 F. Supp. at 771, 2 JA 618).

Writers and publishers achieve financial success not through small numbers of uses of their works at high prices but through many uses of their works at relatively low prices (21 JA 570). They are in a business where "repeat customers" are essential. To be crossed off CBS' list for future business by charging an unreasonable price to CBS in a single transaction would be self-defeating. Thus, publishers used words such as "stupid" and "commercial suicide" to characterize hypothetical situations posed by CBS in which a publisher would seek to "hold up" CBS for a high license fee (19 JA 735-36, 11 JA 3051), and the court concluded that "* * * it is doubtful that any copyright owner would refuse the opportunity to have his music performed on CBS, much less wish to incur CBS' displeasure. * * *" (400 F. Supp. at 771, 2 JA 618).

Finally, the court observed that many of the largest music publishers are owned by network program packagers. These entertainment complexes receive anywhere from $200,000 to $750,000 from CBS for a program but only a small fraction of that amount from a licensing organization for music performance royalties* (400 F. Supp. at 771, 743, 2 JA 618, 590). The court concluded that there could not even be a serious suggestion that these packagers would jeopardize the sale of their programs by making direct licenses unavailable to CBS (400 F. Supp. at 771, 2 JA 618).

4. The "3M Incident"

That CBS brought up anything at all about the "3M Incident" is truly amazing. The district court put the matter into proper perspective when it said

> "* * * at best, the 3M incident does not favor CBS' case. * * *" (400 F. Supp. at 774, 2 JA 621)

The "incident" had its genesis in the decision of Minnesota Mining and Manufacturing Company ("3M") in the mid-1960's to market a tape and player unit called the M-700 which would provide 24 hours of background music (400 F. Supp. at 771, 2 JA 618; 6 JA 1257, 1263-64). The M-700 was designed for sale to commercial establishments such as restaurants, stores, small factories, and doctors' and dentists' offices (6 JA 1258). Because the playing of the M-700 by many, if not all, of 3M's prospective customers would constitute public performances for profit under the copyright law, 3M attempted to obtain public performance licenses for the benefit of its customers covering the three-year period after the customer purchased the tape (6 JA 1265-66, 1270).

3M initially sought public performance licenses from ASCAP (400 F. Supp. at 772, 2 JA 619; 6 JA 1266-67). During the

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*The court observed that CBS supplies some 7500 network programs annually and that in 1969 CBS paid a total of [illegible] million in music licensing fees — an average of about $1000 per program (400 F. Supp. at 743, 2 JA 590).

discussions with ASCAP, a number of problems arose. Most of these problems were peculiar to ASCAP's own operations under its consent decree. However, one of the problems which emerged would confront anyone considering licensing 3M: the problem of relicensing 3M's customers after their initial three-year licenses expired (6 JA 1271).

Traditionally, providers of background music services had leased the tapes to their customers (6 JA 1269). With a lease arrangement, the customer is required to return the tape at the expiration of the term of the lease. If public performance licenses are coterminous with the lease, there is little or no danger of infringing performances, and consequently no policing problem.

What 3M proposed was a departure from this method of doing business: 3M proposed to sell the tapes outright (400 F. Supp. at 772, 2 JA 619; 6 JA 1269). 3M was willing to secure a public performance license for its customers for a three-year term. After the expiration of the term, however, the 3M customer would retain the tape and the licensor of the music would have the problem of attempting to relicense him.

During its negotiations with 3M, ASCAP suggested several times that the type of licenses 3M wanted should be sought directly from publishers (400 F. Supp. at 772, 2 JA 619). Allen Arrow, the New York attorney retained by 3M for its background music projects, testified that

> "* * * I believe on more than one occasion during our meetings with ASCAP's representatives, it was suggested that the type of license which 3M was seeking could best be obtained from its members, from ASCAP's members, that is.
>
> "The Court: Direct?
>
> "The Witness: Direct." (6 JA 1357)

Eventually 3M adopted ASCAP's suggestions and sought public performance licenses directly from ASCAP publishers.* 3M was successful in signing contracts with 27 of the 35 publishers

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*Since 3M had reached an agreement with BMI, it did not have to license directly from BMI affiliates (400 F. Supp. at 772 n. 16, 2 JA 619 n. 16).

it approached ("only" 27 of 35, CBS argues — see 400 F. Supp. at 772, 2 JA 619). The court reviewed the evidence in some detail as to each publisher who did not deal with 3M (400 F. Supp. at 773-74, 2 JA 620-21) and found that no more than two of the eight publishers who rejected the 3M deal* could be characterized as objecting to direct licensing as such.

For example, one publisher (Edwin H. Morris Co.) had completely misapprehended the magnitude of the money involved; three other publishers (MPHC, Irving Berlin Music, and The Richmond Organization) later reached oral agreements with 3M, from which 3M subsequently withdrew because it concluded an agreement with ASCAP; two other publishers (Chappell & Co., Inc. and Famous Music Corp.) reopened negotiations with 3M, but appear ultimately to have failed to overcome their initial concern about policing. At most two publishers (Robbins, Feist & Miller and Bregman, Vocco & Conn) took positions which could be said to be opposition to direct licensing as such.

Thus, the court found that "* * * the incident, if it proves anything at all, establishes that copyright proprietors would deal with CBS for direct licenses." (400 F. Supp. at 773, 2 JA 620) As the court stated:

> "We conclude, that, at best, the 3M incident does not favor CBS' case. The publishers which 3M contacted were offered varying proposals and responded as they thought appropriate to their respective legitimate business interests. Four fifths of them accepted the proposal, the remainder rejected it; and some rejected it the first time around but sought to be included in 3M's second series. The evidence contains no breath of parallel conduct. Those who had fears relating to the problem of relicensing and policing proved to be justified in their fears. Virtually all the publishers responded to 3M's unusual proposal as essentially a clean-cut business proposition; none of them refused entirely to negotiate with 3M. On such a record, no general inference of

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*CBS claims that although the district court stated that 8 publishers refused to deal, the court actually listed 9 publishers (CBS Addendum B p. 8). The "ninth" publisher referred to by CBS was Frank Music which did in fact reach an agreement with 3M (see 24 JA 1339; 400 F. Supp. at 774, 2 JA 621).

unwillingness to engage in direct dealing with 3M can be drawn. Even if it could be, it would be unwarranted to impute any such inference to the very different circumstances prevailing in the market for performance rights to music used on CBS." (400 F. Supp. at 774, 2 JA 621)

* * *

The evidence in the record, especially that cited by Judge Lasker, gives quite a different picture of the facts of this case than that drawn by CBS. The testimony, the nature of the industry, and the way in which music publishers have direct-licensed in somewhat similar circumstances in the past, all lead inescapably to the conclusion that direct licenses are available from copyright owners. The district court's finding on this point is clearly supported by the record.

D. The Fact that Most Users Prefer Blanket Licenses over Other Forms of Licenses Does Not Make Blanket Licenses Unlawful.

The proposition stated in the above heading seems self-evident. Yet, with its argument of "competitive disadvantage" CBS asks this court to hold precisely the contrary.

All of CBS' legal theories depend upon a finding of fact that there are no alternatives to a blanket license.* However, the record shows quite clearly that there are such alternatives. To escape this fact, CBS postulates the astounding proposition that an alternative should not be regarded as available unless it is preferable: Thus CBS claims that if it attempted to pursue the alternatives to blanket licenses it would suffer "competitive disadvantage" vis-a-vis other networks which held blanket licenses; in the face of such threatened "competitive disadvan-

*It is settled that pooling arrangements of the type involved here do not constitute price fixing so long as participants retain the right to license individually. (See authorities cited at p. 12 *supra*.) The existence of alternatives is fatal as well to the Section 2 claim, since ASCAP and BMI can hardly be charged with monopolizing performance rights to songs in their repertories when performance rights to those very songs are also available directly from the copyright owners. See Point II *infra*.

tage", CBS argues, direct licensing is not realistically available and must be treated as not existing at all (CBS Brief pp. 67-74). And thus ASCAP and BMI must be held to violate the antitrust laws.*

CBS' "competitive disadvantage" lies specifically in the preference of CBS' competitors for blanket licenses. The blanket license is presently regarded by the networks as the best way of obtaining music performance rights. CBS' top executives realize that blanket licenses provide the widest possible latitude for creative programming (Paley, 19 JA 764-65; Stanton, 19 JA 877; Wood, 19 JA 1016-17; Sipes, 3 JA 80-86). This is why NBC and ABC can be expected to adhere to their blanket licenses even if CBS pursues the alternative methods — as CBS Vice President Sipes testified at trial, NBC and ABC "* * * would like to stay in the blanket license and watch me destroy myself " (3 JA 86). And thus, CBS' counsel stated that "no competitor [without a BMI or ASCAP] license could allow its competitor to have a license with that pool" (1 JA 197, 251).

The preference of most users for the blanket license does not in any way affect the existence of alternative methods of licensing,

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*As insurance against a finding that the alternatives nevertheless are available, CBS advances another legal argument designed to hold ASCAP and BMI in violation of the antitrust laws precisely because alternatives to the blanket license are available. Thus, CBS has designed a legal theory for whichever way the facts come out. Starting from the assumption that ASCAP and BMI restrain trade by their blanket licensing activities, CBS argues that they should be permitted to carry on those activities only if the activities were necessary to permit the market to function. Since ASCAP and BMI assert that direct licensing would work, CBS concludes that the ASCAP and BMI restraints are unnecessary and should not be permitted to continue. Thus, according to CBS, when defendants proved that they had not restrained trade since other means of licensing were available, they destroyed their "market functioning defense" (CBS Brief p. 64) since they demonstrated that blanket licenses were not necessary. To prove their innocence under one of CBS' arguments, defendants must necessarily prove their guilt under another.

> "There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did he would no longer be crazy and would have to fly more missions * * *." J. Heller, *Catch-22*, 41 (1961).

for the real arbiter of alternatives is the marketplace.* Although blanket licenses are now regarded by network users as cheaper than direct licensing, if the royalty fees and administrative expenses of blanket licensing became higher than the royalty fees and administrative expenses of direct licensing, music users would elect to license directly. Thus, the availability of direct licensing places an important constraint on the price of blanket licenses. As all the expert economists who testified at trial recognized, this constraint constitutes price competition even though users have not actually gone out and solicited price quotations for direct licenses (15 JA 4385; 14 JA 3982; 8 JA 1670).

Any "competitive disadvantage" CBS might suffer by choosing a more expensive method of acquiring performance rights is by itself without antitrust significance. Of course, if the defendants had agreed among themselves to take action to frustrate an attempt to direct license by group boycotts or the like, another case would be presented. But that is not the situation here. Indeed, it could hardly be the case, for CBS has never tried to license directly. As the district court noted, "[t]here is an astonishing lack of evidence that CBS considered * * * the feasibility of direct licensing as a general proposition before commencing suit" (400 F. Supp. at 780, 2 JA 627).

POINT II.
BMI HAS NOT MONOPOLIZED THE RELEVANT MARKET.

The district court observed that

> "* * * The offense of monopolization consists of two elements: possession of monopoly power in the relevant market and willful acquisition or maintenance of that power as distinct from growth as a consequence of a superior product or historical accident. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L. Ed. 2d 778 (1966) * * *" (400 F. Supp. at 782, 2 JA 629)

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*Judge Lasker observed that "[i]t is obvious that CBS might be at a competitive disadvantage vis-a-vis other networks if it held no music license [from ASCAP or BMI]. But that fact only raises, but does not settle, the question of what licensing methods are available to CBS. * * *" (400 F. Supp. at 752, 2 JA 599).

The court went on to find that CBS had failed to prove these elements. CBS agrees that these are the elements of the offense of monopolization, but argues that it proved both elements because of the market definition it presses. The evidence demonstrates that the market definition urged by CBS is specious, and that in a correctly defined market, BMI does not have monopoly power.

A. The Relevant Market Is the Market for Public Performance Rights to Music Wanted for Network Television, Not the Market for a BMI Blanket License.

CBS argues that there are two relevant markets involved in this action: one a market for a BMI blanket license, and the other a market for an ASCAP blanket license (CBS Brief p. 122). CBS' market definition is fundamentally flawed in at least two respects. First, it ignores the product involved in order to focus upon one means for acquiring the product. Second, it creates a tautological monopoly in every seller by defining the market in terms of the seller's sales.

The products involved in this action are the public performance rights to musical compositions suitable for network television use. Public performance rights are what CBS needs in order to broadcast its network programs; public performance rights are what CBS proposes to have its program producers secure directly from copyright proprietors. Obviously CBS is not seeking a BMI blanket license from individual copyright proprietors — indeed CBS says it does not want a BMI blanket license at all. A BMI blanket license is merely one form of transaction for the acquisition of performance rights. The products CBS seeks are the public performance rights, and the *way* in which the rights are obtained should not be confused with the rights themselves.

CBS' claim that BMI has monopolized the market for a BMI blanket license is equivalent to the claim that a seller has monopolized its own sales. As the district court observed, "a blanket license * * * by definition, can be practicably obtained only through a collective licensing agent" (400 F. Supp. at 783, 2 JA 630). In terms of antitrust law CBS' market definition is humbug. A seller sells what it sells, and its share of its own sales is

always 100%. The Sherman Act, however, does not deal in such tautological "monopolies."*

Upon even the most cursory examination of the facts, it is quite clear that the market involved in this case is the market for public performance licenses for music wanted for television network use.

B. BMI Does Not Have Monopoly Power over Performance Licenses for Music Wanted for Network Television.

The impetus for CBS' argument for a market in which BMI would by definition have a 100% share is clear upon examination of the evidence adduced at trial: in the market for performance rights to compositions wanted for television network use, BMI simply does not have monopoly power.

The Supreme Court has said that in determining market power one must consider that all "* * * products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered" are in the relevant market. *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). To be interchangeable the products need not be fungible (*Id.* at 394), but they must be usable for the same purpose ("functional interchangeability"), and purchasers must be willing to substitute one for the other ("reactive interchangeability"). *United States* v. *Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965).

The evidence at trial established that for television network use, musical compositions possess considerable functional and reactive interchangeability. The court found as follows:

> "* * * With rare exceptions, a considerable number of copyrighted songs are suitable for any use a producer might

*Thus, numerous cases have rejected claims that manufacturers have monopolized the sale of their trademarked products. *See, e.g., United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 392-93 (1956); *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Nelligan* v. *Ford Motor Co.*, 262 F.2d 556, 557 (4th Cir. 1959); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899, 906 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F. Supp. 703, 704 (S.D.N.Y. 1969); *Kemwel Automotive Corp.* v. *Ford Motor Co.*, 1966 Trade Cas. Para. 71,882, at 83,096 (S.D.N.Y. 1966).

> have in mind. Although every copyrighted composition is philosophically or aesthetically 'unique' and its uniqueness is dignified by copyright, virtually none of the four million compositions in the ASCAP and BMI repertories is unique in the mind of a television producer. CBS' producer witnesses Wright and Vincent, testified that 'any number' of songs would fit a producer's intended use and that 'there would always be, obviously, alternates.' (Tr. 419, 586)" (400 F. Supp. at 771, 2 JA 618)

Thus, the district court found that "* * * the evidence establishes that musical compositions are fungible * * *" (400 F. Supp. at 783, 2 JA 630).

In a typical situation, therefore, the user has many sources from which to obtain public performance rights for any given type of composition:*

(1) a BMI blanket license;

(2) a BMI per program license;

(3) an ASCAP blanket license;

(4) an ASCAP per program license;

(5) a direct license from any BMI publisher having such a composition in his catalog; and

(6) a direct license from any ASCAP publisher having such a composition in his catalog.

Thus the district court observed that "* * *[m]anifestly, ASCAP and BMI are not the sole source of the performance rights CBS needs * * *" (400 F. Supp. at 782, 2 JA 629).

On the basis of this evidence the court found first that "* * * a bundle of direct licenses for network performances, acquired on an individual transaction basis * * *" would provide CBS with the same performance rights it would use under a blanket license (*Id.*), and that BMI thus does not have monopoly power in the

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*For some types of music such as gospel, country and foreign the user can also add SESAC to his list of potential licensors. SESAC is a music licensing organization with a considerably smaller number of compositions in its repertory than BMI or ASCAP (9 JA 2531).

market for performance rights to compositions suitable for television network use:

> "* * * there is a high degree of interchangeability among compositions, and performance rights to any given type of composition are available from a number of sources if CBS chooses to tap them. * * *" (400 F. Supp. at 782-83, 2 JA 629-30)

Conclusion

For the foregoing reasons, the order appealed from should in all respects be affirmed.

Dated: New York, New York
April 8, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff-Appellant, :

- against - : AFFIDAVIT OF SERVICE

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS, et al., : 75-7600

Defendants-Appellees. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Mario A. Rosado, being duly sworn, deposes and says that he resides at 2809 Barker Avenue, Bronx, New York 10467; that on the 2nd day of June, 1976, he served the within Brief of Defendants-Appellees Broadcast Music, Inc., et al. on the attorneys for Plaintiff-Appellant and certain Defendants-Appellees herein by mailing a true copy thereof, securely enclosed in a post-paid, properly addressed wrapper, in the mail box under the exclusive care and custody of the United States Postal Service at the corner of Wall Street and Broadway, New York, New York, addressed to said attorneys as follows:

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The above addresses has appeared on the prior papers in this action as the office addresses of said attorneys.

Deponent is over the age of 18 years and not a party to this action.

Maria A Rosado

Sworn to before me this
2nd day of June, 1976.

Geraldine E. Griffin
Notary Public

GERALDINE E. GRIFFIN, Notary Public
State of New York - No. 41-1572535
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1977